

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA91/16

PILANESBURG PLATINUM MINES (PTY) LTD

Appellant

and

LISEBO LERATO PEARL RAMABULANA

Respondent

Heard: 06 September 2018

Delivered: 28 August 2019

Summary: Employee alleging breach of contract in that employer failed to follow process provided for in the contract of employment in terminating her services – court finding that employee failed to discharge the onus that there was a breach – further that employee failed to justify the quantum of damages- Labour Court’s judgment set aside and appeal upheld with no order as to costs.

Coram: Coram: Waglay JP, Phatshoane ADJP and Kathree-Setiloane AJA

JUDGMENT

WAGLAY JP

[1] The respondent, (applicant in the Labour Court), instituted an application in the Labour Court in terms of section 77 of the Basic Conditions of Employment Act, 75 of 1997 (BCEA), seeking the following relief:

- '1 *Declaring the decision of the Respondent to terminate the Applicant's employment on 31 January 2013 unlawful;*
- 2 *Declaring the failure by the respondent to comply with the provisions of 6.1 of the contract of employment between the Applicant and the Respondent dated 12 November 2007, a breach of the terms of the employment contract between the Applicant and the Respondent;*
- 3 *The Respondent be ordered to allow the Applicant to return to work;*
- 4 *The Respondent be ordered to pay the Applicant, her salary and all benefits from 31 January 2013 to the date on which her salary and benefits are to be restored.*
- 5 *Alternatively, the Respondent should pay the Applicant's damages consisting of her total costs to company remuneration package from 31 January 2013 to date of her retirement age; and*
- 6 *The costs of this application.'*

[2] The Labour Court (Whitcher J) found for the respondent and made the following order:

'[64] In light of the findings above, the following order is made:

- (a) *It is declared that the decision by the respondent to terminate the applicant's employment from 31 January 2013 is a breach of clauses 6.1 and 11.3 of the applicant's contract of employment.*

- (b) *The termination of employment is set aside, and the applicant is reinstated in the respondent's employ.*
- (c) *The respondent is ordered to pay the applicant's salary and benefits from 31 January 2013 to the date of which her employment, salary and benefits are restored.*
- (d) *The respondent is ordered to pay the costs of this application.'*

- [3] The appellant appeals against the judgment and order of the Labour Court with its leave.
- [4] The appellant, however, failed to lodge the record for the appeal within the prescribed period with the result that in terms of the Rules that govern proceedings in this Court, the appeal has lapsed. The appellant also failed to file its Notice of Appeal timeously. It has filed an application to reinstate the appeal and also applied for condonation for the late filing of the notice of appeal. The appellant's attorneys have not displayed any urgency in prosecuting this matter and have repeatedly failed to comply with the time periods prescribed by the rules. This notwithstanding, the Court must consider all the necessary circumstances before deciding on whether to grant condonation and to reinstate the appeal.
- [5] I am of the view that although the appellant has been less than diligent in prosecuting the appeal the merits are such that the condonation and the reinstatement of the appeal should be granted. But this Court, as a mark of its displeasure, would not allow costs in favour of the appellant.

Background

- [6] According to the respondent, she was employed as a SED manager on 14 February 2008 in terms of a written contract of employment.
- [7] On 17 May 2012, she was escorted out of the appellant's premises and taken to her place of residence for her own safety because the local community within

which she was operating was not pleased with the manner in which she was conducting the affairs of the appellant.

- [8] The employer operates a mining company which is located within the Bakgatla Ba kgafela, a community near Rustenburg in the North West Province. The said community is also a material shareholder of the appellant.
- [9] Some days after being taken home, the respondent was summoned to a meeting with the general manager and the human resource manager of the appellant at which meeting “the issue of my safety was mildly touched on and discussions were centred on allegations that I was causing harm to the company ...must therefore decide on the quickest painless way to part ways...” At this meeting, it was reiterated that she was removed from the workplace for her own safety and that she was not on suspension.
- [10] It appears that the respondent directed a letter to the appellant on 11 June 2012 which was not produced nor is there any reference to it in the papers save what is recorded in respondent’s correspondence to the appellant dated 9 July 2012 which states:

‘I hereby wish to refer to my letter dated 11 June 2012 in which I outlined the sequence of events as they unfolded before I was illegally and unprocedurally removed from the workplace without any meaningful and logical explanation nor valid reasons. To date, I have received no formal response nor any explanation from yourselves as to the reasons behind my removal from my workplace.

Since our meeting of the 31st May 2012 (during which Mr Casper Badenhorst requested that we part ways) I have heard nothing from the company. I hereby wish to know my status in respect of my employment with the company as I was informed in the same meeting that I was not being suspended, but was removed for my own safety. I have since been waiting at home for the past 2 months waiting for your response and further instructions.’

- [11] On 27 July 2012, the appellant furnished the respondent with a “Severance and Settlement Agreement” offering about four months’ salary to end the employment relationship. The respondent rejected the offer.
- [12] Six months later, on 14 January 2013, respondent received a letter from the appellant. In this letter, the appellant mentions a consultation that took place on 10 October 2012 with a view to resolving the dispute by parting ways. The appellant persisted that the respondent’s continued employment was not tenable in view of the community’s sentiments against her ongoing relationship with the appellant. The appellant adds that at this meeting, it was *“stressed that we were unable to resolve with the community their concerns about your presence and we were not prepared to allow or insist that you continue such work for your own personal safety and the company’s interest within the community.”* The respondent does not, in her founding affidavit, make any reference to this meeting, nor to the fact that the appellant again contacted her in November 2012 calling her to attend a meeting on 21 November 2012 which she did not attend. Nor does she mention that on 23 November 2012, she telephoned the appellant to state that she was not prepared to meet with it.
- [13] On 30 November 2012, which also is not mentioned in the respondent’s founding affidavit, her attorneys wrote to the appellant where the respondent agreed to leave appellant’s employ if the appellant paid her an amount equivalent to her five years’ remuneration. The appellant rejected the offer.
- [14] By means of a letter dated 14 January 2013, the appellant informed the respondent that it no longer intended the *status quo* to continue and that it needed to resolve the matter by 31 January 2013. The respondent’s reply to this was that she was prepared to meet with the appellant to resolve the matter either on 29, 30 or 31 January 2013 or between 4 and 8 February 2013. That notwithstanding, the appellant terminated the respondent’s employment on 31 January 2013. The purported reason it favoured for the termination was its “operational reasons.”

- [15] The respondent states that her employment was terminated without any form of consultations or *“disclosing the reasons for my retrenchment based on operational requirements”*, and that such termination was in breach of the employment contract between the respondent and the appellant more particularly paragraph 6.1 thereof which provides:

‘Subject to compliance with the Employer’s Disciplinary Code and Procedure any party may terminate this contract by giving at least one month’s notice to the other party provided that-

6.1.1 the provisions of schedule 8 to the Labour Relations Act, 1995, will apply to any dismissal of the Employee; and

6.1.2 the Employer shall be entitled to summarily dismiss the employee for any sufficient reason acceptable in law.”

- [16] Based on the above, the respondent’s contention is that her dismissal was unlawful.

- [17] The appellant in its answering affidavit emphasised that Bakgatla Ba kgafela community are its shareholders and stakeholders; and that it ordinarily engaged the community “on a number of economical production and social matters” and that the consent and input of the community were essential for the successful operation of the appellant. It further adds:

‘12.5 *In further amplification of the aforesaid it should be stated that access to the region together with production activities on same are regulated and governed by a constructive and close relationship between the local community and the Respondent [the appellant].*

12.6 *During May 2012 the local community became severely aggrieved as a result of the fact that it felt that the local youths were not given preference when posts became available at the Respondent’s mine.*

- 12.7 *The local community demanded that residents and more particularly its youth should be given preference when posts became available at the local mines.*
- 12.8 *Community alleged that the Applicant [respondent] effectively "sold" proof of residence to individuals that were not members of the local community. She was effectively accused of selling jobs and giving "outsiders" proof of residence in return for money.*
- 12.9 *In addition to the aforesaid it was further alleged that the Applicant [respondent] used mine adult basic education and training (ABET) as a recruitment ground as she allegedly placed people there for 3 months and would then later give them jobs at the Respondent [Appellant].*
- 12.10 *As a result of the aforesaid it was decided that in order to ensure the Applicant's [respondent's] safety it would be better for her to stay at home. In addition to the aforesaid and taking into account the serious nature of the allegations against her, the Respondent[Appellant] deemed it appropriate to relieve her of her duties at the time.'*

[18] The respondent denies the above allegations *"in so far as they are inconsistent with my founding affidavit and the replying affidavit"*. Nothing of what is recorded above is inconsistent with what is contained in the respondent's founding affidavit.

[19] Appellant's further averments in its answering affidavit, contrary to what is stated by the respondent in her founding affidavit, that the appellant merely touched on the reasons for her being told to remain at home, is that it explained that as a consequence of her conduct (set out in paragraph 17 above), the relationship between it and the community, her conduct had "material and serious consequences as a result of which both the community and it had lost trust in her and therefore it would be appropriate to discuss an "amicable separation." Again, the respondent fails to deal with the appellant's averments instead she simply restated that appellant failed to hold a disciplinary hearing against her and to have regard to the principles of natural justice.

- [20] The respondent brought the matter to court by way of motion proceedings. Therefore, the evidence as contained in the affidavits ought to be assessed by applying the Plascon-Evans test.¹
- [21] The facts distilled from the papers are that the appellant received complaints from the community which the respondent served on behalf of the appellant. The complaints were of a serious nature more particularly: that instead of ensuring, as she was required to, that new employees were members of the community, respondent dishonestly employed people from outside the community by subterfuge creating the impression that the employees were from the community. The community was so outraged at the respondent's conduct that they were intent on visiting violence upon her. The appellant, therefore, escorted her to her home from the workplace and informed her that for her own safety she should remain at home. She was neither suspended nor was her salary withheld.
- [22] Appellant's communication with the respondent was that, despite its meeting with the community, it could not guarantee her safety and therefore the only option was to part ways. The appellant offered her about four months' salary so as to amicably part ways which she rejected and proposed that she be paid a salary equal to what she would have earned over a period of five years calculated on a costs to company basis. The appellant rejected this counter offer. Over a period of about eight months, the respondent remained at home and the appellant continued to remunerate her. During this period, they met intermittently although the respondent alleges that the appellant only made cursory references to the objections raised by the community. This is improbable. From the evidence, it is clear that the appellant repeatedly informed the respondent of the reasons for being requested not to render her services. Respondent herself sought and obtained confirmation that the appellant's insistence that she stays at home was not because she was suspended but because the appellant feared for her safety at the workplace.

- [23] While the respondent was at home, the appellant set in motion the termination of her employment. This was not only on the basis that the local community was a material shareholder. There was an agreement between the appellant and the community that the appellant would look after its interest. One of ways to do so was to offer new employment opportunities to the local residence. The community's complaint was that respondent failed to properly implement that part of the agreement by consciously employing people who were disqualified.
- [24] Despite all the community's complaints being brought to the respondent's attention, on her version, she adopted a rather malevolent approach. She simply did not respond to these allegations. Her attitude was: "charge me and prove it". Not once in the eight months did she ever inform the employer that the community's complaints were untrue or perhaps misconceived.
- [25] The appellant had to balance this rather sensitive issue. On one hand, it relied on the community, which raised issues which were serious with anger and frustration, for its operational guidance and assistance. On the other, the respondent did not react to the concerns broached. In the circumstances, the appellant decided, especially after it had traversed the issues with the community which was adamant that respondent not be retained, that the only option it had was to terminate the employment relationship.
- [26] The unchallenged evidence was that it was in the interest of the appellant to terminate the employment relationship so as to continue with its relationship with its material shareholders and to ensure that no harm is visited upon the respondent. More importantly the relationship between the appellant's material shareholders and the respondent had broken down. While the respondent saw no purpose in meeting with the appellant, she eventually acceded to the invitation when the horse had already bolted.
- [27] The appellant labelled the respondent's termination as one for "operational reasons". The respondent immediately equated this label to be a dismissal based on appellant's "operational requirements" as contemplated by s189 of the LRA.

This is erroneous. It is not proper for employers in a labour relations environment to always label their action or even the charge they prefer against an employee for misconduct. There is simply no need to try and label or compartmentalise a decision or for that matter a misconduct charge. All that needs to be done is for an employer to set out the facts and explain the complaint or the issue that arises from the facts which will be subject of the enquiry or is the basis for the decision it has made.

[28] In this matter, the appellant terminated the respondent's contract of employment because it was confronted with a conflict between its material shareholder and its employee. It did not enquire from the respondent if the community's complaint against her was valid nor did the respondent volunteer any response. The appellant attempted to negotiate with the community for the respondent's return to work, when this failed it was according to it, compelled to terminate the employment relationship, and this after a period of eight months. On the papers as they stand the appellant simply had no other option. In such circumstances, the termination of respondent's employment cannot constitute an unlawful termination. It may be unfair but that is not what the Labour Court was called upon to decide.

[29] The respondent disavowed reliance on the LRA when it sought relief in terms of the BCEA and on unlawfulness of dismissal rather than approaching the CCMA on the basis of an unfair dismissal. She relied on contractual law as opposed to equity and fairness. The respondent's contention is that the appellant is bound by the terms agreed upon with regard to the process of termination and that it failed to comply therewith hence it is in breach of their agreement. However, she fails to recognise that she cannot simply raise non-compliance of a term of a contract as a breach. She has to show that the preconditions for the appellant to comply with the clauses of the agreement are met.

[30] In my view, the precondition for the compliance with the process terms of the employment contract was that she had committed misconduct. The appellant has

never said that, that was the case. From the outset, it made it clear that it sought to protect the respondent from possible physical harm and to appease its material shareholders. It became impossible to have the respondent return to work. After remunerating her for over eight months while she stayed at home appellant terminated her employment.

[31] As this is not a matter where it has to be determined whether the termination was fair as required by the LRA but whether it was a breach of contract, the *onus* was upon the respondent to satisfy the Court that it was so. She has failed to do so. I must also reiterate that clause 6.1.1 of her contract of employment upon which the respondent relies relates to dismissal based upon conduct or capacity. As I stated earlier, it is not the appellant's or the respondent's case that she was dismissed for either. The respondent's dilemma, as has often been raised by this Court, is her proceeding in terms of the BCEA instead of the LRA's unfair dismissal jurisdiction. The relief of reinstatement in terms of the LRA is the same as specific performance that arises in a contractual dispute and whilst compensation is statutory in terms of the LRA, an employee proceeding in terms of the BCEA must prove the damages she has suffered to obtain monetary relief. Most importantly, had the respondent proceeded in terms of the LRA, it would have been the appellant who would have to satisfy a commissioner that the dismissal was fair.

[32] I also need to add that had I found that appellant did in fact breach the agreement the only relief open to her was either specific performance or damages. In view of the facts of this case, it would not be appropriate to grant her specific performance. With regard to damages, as I said earlier there was a duty upon the respondent to prove the quantum of her damages, to simply demand damages in the amount that she would earn until her retirement is totally misconceived. Damages in a breach of contract needs to be proved, she failed to prove any, nor does she allege that she has been out of work from the date of her employment being terminated. In the circumstances, had the respondent proved a breach, she would not in law be entitled to any relief.

[33] But worse still, because this is a civil matter, there is no reason why costs should not follow the result, however, for reasons recorded earlier in this judgment, this Court will not grant a costs order in favour of the appellant as a mark of its displeasure at the less than efficient manner with which the appellant had complied with the Rules of this Court. However, there is no reason why there should not be an order of costs in the Labour Court although I hope the appellant will not enforce that order.

[34] In the result, I make the following order:

- (a) The appeal is reinstated;
- (b) The late filing of the notice of appeal is condoned;
- (c) The appeal is upheld with no order as to costs.
- (d) The order of the Labour Court is set aside and is substituted with the following:
“the application is dismissed with costs”.

I agree

Waglay JP

Phatshoane ADJP

I agree

F Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:

Adv C Goosen

Instructed by Macintosh Cross & Farquharson
Attorneys

FOR THE RESPONDENT:

Adv Mphahlele SC

Chosane Attorneys